

1 complete compliance with all applicable federal, state and local laws, regulations and permits

2 VII. PROJECT SITE

3 14. Pierce County, as the owner of the Project Site, has conveyed and granted to the State
4 of Washington the right to use the Project Site forever for salmon recovery and conservation
5 purposes. Pierce County has recorded deed restrictions for the Project Site, which are attached as
6 Appendix C hereto.

7 VIII. PROJECT DEVELOPMENT

8 15. Defendants shall provide the funds and services to ensure that all necessary steps are
9 taken to construct the Project and to perform any additional activities in accordance with the details,
10 specifications and project development schedule set out in Appendix A.

11 16. Defendants shall avoid taking any action on the Project Site property or adjacent
12 property owned or controlled by Defendants that is inconsistent with this Consent Decree and that
13 would interfere with the Project such that it would substantially decrease the likelihood of success
14 of the Project. Defendants shall notify the Trustees in writing at least 30 days prior to entering into
15 any contracts for or applying for any permits for the taking of any actions on the Project Site other
16 than those identified in Appendix A. Such notice shall include a narrative description of the proposed
17 actions plus a site diagram indicating the location of the proposed actions.

18 17. Within 60 days after completion of construction of the Project, Defendants shall
19 submit a written Notice of Completion to the Trustees. The Trustees shall review the course and
20 results of the development of the Project to determine whether the Project has been completed in
21 accordance with Appendix A. Within 60 days after receiving the Notice of Completion, the Trustees
22 shall submit to Defendants either (a) a written notice identifying specific deficiencies the Trustees
23 determine must be satisfied for the Project to be completed in accordance with Appendix A (Notice
24 of Deficiencies); or (b) a written notice of the Trustees' determination that the Project has been so
25 completed (Notice of Approval of Completion). Following receipt of a Notice of Deficiencies,
26 Defendants shall correct the identified deficiencies and complete the Project in accordance with
27 Appendix A, and submit to the Trustees an amended Notice of Completion for review and response
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1 in accordance with this Paragraph Any delay in completing Project construction as a result of the
2 operation of this Paragraph shall not in and of itself constitute grounds for relief from the
3 requirement to pay stipulated penalties under Section XVI for compliance delays.

4 18. Within 180 days following receipt of the Trustees' Notice of Approval of Completion
5 for the Project, Defendants shall submit to the Trustees a Project Completion Accounting. The
6 Project Completion Accounting shall itemize the costs incurred by Defendants in developing the
7 Project.

8 IX. POST-CONSTRUCTION ALTERATIONS;
9 FURTHER RESTORATION ACTIONS

10 19. In addition to any measures undertaken in connection with the Project monitoring
11 plan identified in Appendix A, following construction of the Project the Trustees may at any time
12 make such post-construction alterations or implement such further restoration actions on the Project
13 site as they determine appropriate. Such post-construction alterations or further restoration actions
14 shall only be taken with the approval of Defendants and Pierce County, which approval may be
15 withheld only upon a showing that the proposed activity would be inconsistent with the purposes of
16 the Project as described in Appendix A (including the Project's flood control purposes), would be
17 inconsistent with other provisions of this Consent Decree or other applicable law, or would impose
18 costs upon Defendants.

19 X. ACCESS TO INFORMATION AND PROJECT SITE

20 20. To facilitate their oversight responsibilities, the Trustees shall have full access to all
21 work in progress required under this Consent Decree.

22 21. Commencing upon the date of lodging of this Consent Decree, Defendants agree to
23 provide the Trustees and their contractors access at all reasonable times to the Project Site and to any
24 property under the control of Defendants to which access is required for the oversight or
25 implementation of this Consent Decree. Where the property to which access is sought is not
26 otherwise open to public access, the Trustees shall give notice prior to access. Each Trustee shall
27 have the authority to enter freely and move about such property at all reasonable times for the
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1 purposes of overseeing the requirements of this Consent Decree, including, but not limited to:

- 2 a. Monitoring and assessing progress on the planning, development,
3 maintenance and monitoring of the Projects;
- 4 b. Verifying any data or information submitted to the Trustees;
- 5 c. Inspecting and copying records, operation logs, contracts or other documents
6 maintained or generated by Defendants or their contractors hereafter retained
7 to perform work undertaken pursuant to this Consent Decree;
- 8 d. Conducting such tests, investigations or sample collections as deemed
9 necessary to monitor compliance with this Consent Decree or to assist in
10 further identifying and quantifying natural resource injuries requiring
11 restoration actions and in planning and carrying out further restoration
12 actions;
- 13 e. Using a camera, sound recording device or other type equipment to record the
14 work done under this Consent Decree or injury to natural resources;
- 15 f. Undertaking any maintenance action or post-construction alterations or
16 further restoration actions in accordance with Paragraph 19

17 22. Defendants shall have the right to accompany any Trustee or its representative on the
18 property. Anyone provided access through this Consent Decree shall comply with applicable health
19 and safety requirements and shall not interfere with ongoing operations

20 XI. SELECTION OF CONTRACTORS

21 23. The selection of any contractor hereafter retained by Defendants to perform any of
22 the work required under this Consent Decree shall be subject to Trustee approval. Defendants shall
23 notify the Trustees in writing of the name, title and qualifications of any contractor Defendants
24 propose to retain, and of any proposed changes in the selection of a contractor. The Trustees will
25 notify Defendants in writing of the approval or disapproval of a proposed contractor. The Trustees'
26 assent to the proposed selection or change of a contractor may be presume unless the Trustees notify
27 Defendants in writing of their objection to the proposed selection or change within 30 days of
28 Defendants' written selection notice. Defendants shall notify the Trustees in writing of the contractor
and of any subcontractors that have been retained by Pierce County to perform any of the work

1 required under this Consent Decree.

2 XII. REIMBURSEMENT OF RESTORATION OVERSIGHT COSTS

3 24. Defendants shall reimburse Trustee costs incurred in the oversight of the development
4 and maintenance of the Project and in monitoring Project performance in the total amount of
5 \$150,000. Sums paid under this Paragraph shall be deposited in the Commencement Bay Restoration
6 Account for use as the Trustees shall determine in accordance with the terms of this Consent Decree
7 and other applicable law. Payment shall be deposited within 30 days following the entry of this
8 Consent Decree with the Registry of the Court by certified check, bearing the notation "Hylebos
9 NRDA Mediation Group - Oversight and Monitoring Costs" and the civil action number assigned
10 to this Consent Decree, made payable and addressed as follows:

11 Payee: Clerk of the Court

12 Address: Clerk, U.S. District Court
13 U.S. Courthouse, Room 215
14 1010 Fifth Avenue
Seattle, WA 98104

15 Memo: For Deposit into the Commencement Bay Natural Resource Restoration Account
16 C93-5462 [INSERT THIS CASE DOCKET NUMBER]

17 Defendants shall send photocopies of each check and any transmittal letter to: Chief, Environmental
18 Enforcement Section, Department of Justice, P.O. Box 7611, Ben Franklin Station, Washington,
19 D.C. 20044; and to Robert A. Taylor, NOAA GCNR/NW, 7600 Sand Point Way NE, Seattle, WA
20 98115-0070. Any funds paid pursuant to this Paragraph that are not utilized by the Trustees to cover
21 oversight costs or costs of maintenance, monitoring or adaptive management for the Project may be
22 applied by the Trustees toward one or more additional restoration projects in the Commencement
23 Bay Environment.

24 XIII. PAST COST REIMBURSEMENT

25 25. Within 30 days of entry of this Decree, Defendants will pay to the Trustees sums
26 totaling \$1,793,888.46 in damage assessment costs. These sums shall be paid in the following
27 amounts and particulars:
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1 Trustee: National Oceanic and Atmospheric Administration
2 Amount: \$1,447,127.08

3 Trustee: U.S. Department of the Interior
4 Amount: \$241,939.29

5 Payments to NOAA and the U.S. Department of the Interior shall be made by FedWire Electronic
6 Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT
7 procedures. Payment shall be made in accordance with instructions provided to Defendants by the
8 Financial Litigation Unit of the U.S. Attorney's Office of the Western District of Washington. Any
9 payments received by the Department of Justice after 4:00 p.m. Eastern Standard Time shall be
10 credited on the next business day. Defendants shall provide at least five days notice to the Financial
11 Litigation Unit before making the transfer.

12 Payments to the other Trustees shall be made by certified checks, bearing the notation
13 "Hylebos NRDA Mediation Group - Commencement Bay Assessment Costs," in the amounts
14 indicated and made payable and addressed as follows:

15 Trustee: State of Washington
16 Amount: \$29,853.49
17 Payee: State of Washington/Department of Ecology
18 Address: State of Washington
19 Department of Ecology
Attention: Cashiering Section
P.O. Box 5128
Lacey, WA 98503-0210

20 Trustee: Puyallup Tribe of Indians
21 Amount: \$68,299.79
22 Payee: Puyallup Tribe of Indians
23 Address: Mr. William Sullivan
Environmental Protection Department
24 Puyallup Tribe of Indians
2002 E. 28th Street
Tacoma, WA 98404

25 Trustee: Muckleshoot Indian Tribe
26 Amount: \$6,668.81
27 Payee: Muckleshoot Indian Tribe

1 Address: Mr. Rob Otsea
2 Office of the Tribal Attorney
3 Muckleshoot Indian Tribe
4 39015 172nd Avenue S E.
5 Auburn, WA 98002

6 26. At the time of each payment Defendants will send notice that payment has been made
7 to the Trustees and DOJ in accordance with Section XXIV (Notices and Submissions). Such notice
8 will reference Commencement Bay NRDA, DOJ case number 90-11-2-1049, and the civil action
9 number.

10 XIV. FAILURE TO MAKE TIMELY PAYMENTS

11 27. If Defendants fail to make any payment under Paragraphs 24 and 25 by the required
12 due date, interest shall be assessed at the rate specified for interest on investments of the EPA
13 Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October
14 1 of each year in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest is the rate in
15 effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each
16 year. Interest will continue to accrue on the unpaid balance through the date of payment.

17 XV. DISPUTE RESOLUTION

18 28. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution
19 procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with
20 respect to this Consent Decree.

21 29. Any dispute which arises under or with respect to this Consent Decree shall in the
22 first instance be the subject of informal negotiations between the Trustees and Defendants. The
23 period for informal negotiations shall not exceed twenty-one (21) days from the time the dispute
24 arises, unless the parties to the dispute agree otherwise in writing. The dispute shall be considered
25 to have arisen when the Trustees send Defendants a written notice specifying the nature of the
26 dispute and requested relief ("Notice of Dispute") or Defendants sends the Trustees a written Notice
27 of Dispute.

28 30. a. If the Parties cannot resolve a dispute by informal negotiations under the

1 preceding Paragraph, then the position advanced by the Trustees shall be considered binding unless,
2 within twenty-one (21) days after the conclusion of the informal negotiation period, Defendants
3 invoke the formal dispute resolution procedures of this Section by serving on the Trustees a written
4 Statement of Position on the matter in dispute, including, but not necessarily limited to, any factual
5 data, analysis or opinion supporting that position and any supporting documentation relied upon by
6 Defendants.

7 b. Within twenty-one (21) days after receipt of Defendants' Statement of
8 Position, the Trustees shall serve on Defendants their written Statement of Position, including, but
9 not necessarily limited to, any factual data, analysis or opinion supporting that position and all
10 supporting documentation relied upon by the Trustees.

11 c. An administrative record of the dispute shall be maintained by the Trustees
12 and shall contain all Statements of Position, including supporting documentation, submitted pursuant
13 to this Section.

14 d. The Formal Dispute Resolution Representatives for Defendants and the
15 Trustees shall meet to discuss the matter in dispute at the earliest available opportunity and will work
16 in good faith to resolve the matter in dispute. If the Parties fail to resolve the dispute within twenty-
17 one (21) days after the initial meeting of the Formal Dispute Resolution Representatives, then the
18 position advanced by the Trustees in their Statement of Position shall be considered binding upon
19 Defendants, subject to any agreements the Formal Dispute Resolution Representatives may have
20 reached on one or more issues and further subject to Defendants' right to seek judicial review
21 pursuant to the following Subparagraph. In such event the Trustees shall within five (5) days of the
22 conclusion of the formal dispute resolution process notify Defendants in writing that the formal
23 dispute resolution process has concluded.

24 e. Any matter in dispute shall be reviewable by this Court, provided that a
25 motion for judicial review of the decision is filed by Defendants with the Court and served on all
26 Parties within twenty-one (21) days of receipt of the Trustees' letter notifying Defendants of the
27 conclusion of the formal dispute resolution process. The motion shall include a description of the
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1 matter in dispute, the relief requested and the schedule, if any, within which the dispute must be
2 resolved to ensure orderly implementation of this Consent Decree. The Plaintiffs may file a response
3 to Defendants' motion within twenty-one (21) days of receipt of the motion or within any different
4 time frame that the local rules of court may provide, and Defendants may file a reply brief within five
5 (5) days of receipt of the response or such different time that the local rules of court may provide.

6 f. The Court may rule based on the written record, with or without oral
7 argument. The burden of proving entitlement to the requested relief with respect to the matter in
8 dispute shall be on the Party requesting it.

9 g. The foregoing notwithstanding, the Parties acknowledge that disputes may
10 arise that require resolution on an expedited basis. In such cases, the Parties shall agree on an
11 expedited schedule or, absent prompt agreement, either Defendants or the Trustees may petition the
12 Court for the imposition of an expedited schedule.

13 31. The invocation of formal dispute resolution procedures under this Section shall not
14 extend, postpone or affect in any way any obligation of any Party under this Consent Decree not
15 directly in dispute or contingent on issues in dispute, unless the Trustees or the Court agrees
16 otherwise. Defendants' obligations to pay stipulated penalties as provided in Section XVI with
17 respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution
18 of the dispute. Notwithstanding the stay of payment, the obligation to pay stipulated penalties shall
19 accrue from the first day of noncompliance with any applicable provision of this Consent Decree,
20 subject agreement of the Parties or to the decision of the Court on Defendants' motion. If Defendants
21 do not prevail on a disputed issue, stipulated penalties shall be assessed and paid as provided in
22 Section XVI.

23 XVI. STIPULATED PENALTIES

24 32 The Parties stipulate that time is of the essence in the implementation of the
25 requirements of this Consent Decree and that delays in carrying out the activities required herein may
26 diminish the compensatory value attributable to those activities. Consequently, in the event that
27 Defendants exceed the deadline provided for one of the activities described below (subject to any
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1 modifications agreed to under Section XXVIII) and such delay is not excused through operation of
2 the dispute resolution provisions (Section XV) and/or the force majeure provisions (Section XVII),
3 Defendants shall, as a stipulated penalty, increase the financial contributions it makes under this
4 Consent Decree to fund habitat restoration actions, over and above any payments required elsewhere
5 under this Consent Decree, as follows:

6 a For each week Defendants fail to comply with a deadline under Paragraph 24
7 or 25 for making any payment; in the Project Development Schedule included in Appendix A; under
8 Paragraph 17 for submitting a Notice of Completion; under Paragraph 18 for submitting a Project
9 Completion Accounting; or under Paragraph 40, if applicable, for providing copies of certificates
10 of insurance and insurance policies, Defendants shall pay a stipulated penalty in the amount of
11 \$1,000. Where the delay extends beyond the second week, the stipulated penalty shall apply to each
12 additional day of delay for each such missed deadline. For purposes of this Subparagraph, a week
13 shall equal a continuous period of seven days.

14 b Stipulated penalties are due and payable within 30 days of the date of the
15 demand for payment of the penalties by the Trustees. All payments to the Trustees under this
16 Paragraph will be made by a certified check made payable to the Clerk of the Court. This check will
17 be deposited in the Commencement Bay Restoration Account.

18 c At the time of each payment, Defendants will send notice that payment has
19 been made to the Trustees and DOJ in accordance with Section XXIV (Notices and Submissions).
20 This notice will reference Commencement Bay NRDA, DOJ Case Number 90-11-2-1049, and the
21 civil action number

22 d Penalties need only be paid upon demand. Penalties for late payments will
23 begin to accrue on the day after payment is due. All other penalties will begin to accrue on the day
24 after the Trustees' notice of noncompliance pursuant to Paragraph 10 and will continue to accrue
25 through the date of payment. Nothing in this Decree prevents the simultaneous accrual of separate
26 penalties for separate violations of this Decree.

27 e Defendants may dispute the Trustees' right to the penalties identified under
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1 Subparagraph a above by invoking the dispute resolution procedures of Section XV.

2 33. If Plaintiffs bring an action in court to enforce this Decree and prevail, Defendants
3 will reimburse Plaintiffs for all costs of such action, including but not limited to costs of attorney
4 time.

5 34. Payments made under this Section are in addition to any other remedies or sanctions
6 available to Plaintiffs by virtue of Defendants' failure to comply with the requirements of this
7 Decree.

8 35 Notwithstanding any other provision of this Section, Plaintiffs may, in their
9 unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued
10 pursuant to this Decree. Payment of stipulated penalties does not excuse Defendants from payment
11 as required by Sections VIII, XII or XIII or from performance of any other requirement of this
12 Consent Decree

13 36. The Trustees may use sums paid as stipulated penalties under Paragraph 32 to pay
14 unreimbursed damage assessment costs and/or to fund or contribute to additional actions to restore
15 Commencement Bay natural resources.

16 XVII. FORCE MAJEURE

17 37 "Force majeure," for purposes of this Consent Decree, is defined as any event arising
18 from causes beyond the control of Defendants that delays or prevents the performance of any
19 obligation under this Consent Decree despite Defendants' best efforts to fulfill the obligation. The
20 requirement that Defendants exercise "best efforts to fulfill the obligation" includes using best efforts
21 to anticipate any potential force majeure event and use best efforts to address the effects of any
22 potential force majeure event (1) as it is occurring and (2) following the potential force majeure
23 event, such that the delay is minimized to the greatest extent possible. "Force majeure" does not
24 include financial inability to fulfill the obligation. The requirement that Defendants exercise "best
25 efforts to fulfill the obligation" also includes, where necessary, the filing of legal actions to compel
26 contract performance in accordance with the design and schedule approved by the Trustees herein.

27 38. a. If any event occurs or has occurred that may delay the performance of any
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1 39. a. Defendants shall ensure that any contractor hereafter retained who performs
2 work for them in carrying out the requirements of this Consent Decree shall indemnify for and hold
3 harmless each of the Plaintiffs and/or their agents, employees and representatives from any and all
4 damage claims or causes of action arising from acts or omissions of Defendants and/or their officers,
5 employees, agents, contractors, subcontractors, representatives and any persons acting on their behalf
6 or under their control, in carrying out the requirements of this Consent Decree. Further, Defendants
7 agree to pay the Plaintiffs all costs they incur, including but not limited to attorneys fees and other
8 expenses of litigation and settlement, arising from or on account of damage claims made against the
9 Plaintiffs based on acts or omissions of Defendants or their officers, employees, agents, contractors,
10 subcontractors, representatives and any persons acting on their behalf or under their control, in
11 carrying out the requirements of this Consent Decree. None of the Plaintiffs shall be held out as a
12 party to any contract entered into by or on behalf of Defendants or Pierce County in carrying out the
13 requirements of this Consent Decree. Neither Defendants, Pierce County, nor any such contractor
14 or representative of them shall be considered an agent of any Plaintiff, and Defendants shall require
15 any contractor hereafter retained by Defendants who performs work for Defendants in carrying out
16 the requirements of this Consent Decree to affirmatively acknowledge that it is not acting as an agent
17 of any Plaintiff.

18 b. Defendants shall ensure that any contractor hereafter retained who performs
19 work for them in carrying out the requirements of this Consent Decree waive, and shall indemnify
20 and hold harmless each of the Plaintiffs with respect to, any claims for damages or reimbursement
21 from the Plaintiffs or for set-off against any payments made or to be made to the Plaintiffs, arising
22 from or on account of any contract, agreement or arrangement between Defendants and any person
23 in carrying out the requirements of this Consent Decree, including claims on account of construction
24 delays

25 40. In the event that Defendants elect to perform any portion of the work required to
26 develop the Project, Defendants shall secure and maintain comprehensive general liability insurance
27 and automobile liability insurance with limits of \$10,000,000 (ten million dollars), combined single
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1 limit. In addition, for the duration of this Consent Decree Defendants shall satisfy, or shall ensure
2 that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the
3 provision of worker's compensation insurance for all persons performing any work involved in
4 implementing this Consent Decree. No later than 15 days before commencing any work involved
5 in implementing this Consent Decree, Defendants shall provide to the Trustees certificates of such
6 insurance and a copy of each insurance policy. Defendants shall resubmit such certificates and
7 copies of policies each year on the anniversary of the effective date of this Consent Decree. If
8 Defendants demonstrates by evidence satisfactory to the Trustees that any contractor or subcontractor
9 maintains insurance equivalent to that described above, or insurance covering the same risks but in
10 a lesser amount, then, with respect to that contractor or subcontractor, Defendants need provide only
11 that portion of the insurance described above that is not maintained by the contractor or
12 subcontractor.

13 41. The Trustees agree to require that any contractor who performs work for them in the
14 Project area shall agree to indemnify and hold harmless Defendants and their agents, employees and
15 representatives, against all claims of any nature, including, but not limited to, claims by third parties
16 for death, personal injury, or property damage, and claims for environmental liability that arise as
17 the result of negligent acts or omissions of such contractor, its employees, representatives and agents
18 in carrying out the provisions of this Consent Decree. Such indemnity shall be limited to actual
19 damages only, and shall not extend to consequential damages or any other liability except as stated
20 herein.

21 XIX. COVENANT NOT TO SUE BY PLAINTIFFS

22 42. Except as specifically provided in Section XX (Reservations of Rights) below,
23 Plaintiffs covenant not to sue or to take administrative action against Defendants pursuant to Section
24 107(a) of CERCLA, 42 U.S.C. § 9607(a); Chapter 70.105D RCW; Section 311 of the Clean Water
25 Act (CWA), 33 U.S.C. § 1321; or Section 1002(a) of the Oil Pollution Act of 1990 (OPA), 33 U.S.C.
26 § 2702(a), to recover Natural Resource Damages. This covenant not to sue will take effect upon
27 entry of this Consent Decree by the Court and continue in effect conditioned upon the satisfactory
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